Submitted under Rule 2-447
Judge Davis
Gary 4.
Affd
20 Wallace 655

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 730.

FRANK A. OTIS AND WILLIAM P. O'CONNER, PARTNERS DOING BUSINESS UNDER THE FIRM-NAME OF F. A. OTIS & COMPANY, PLAINTIFFS IN ERROR,

vs.

HENRY B. CULLUM, RECEIVER OF THE FIRST NATIONAL BANK OF TOPEKA, KANSAS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED OCTOBER 16, 1875.

Affd
Swayne J.
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2 In the circuit court of the United States for the district of Kansas.

FRANK A. OTIS, WILLIAM P. O'CONNOR, PARTNERS, doing business under the firm-name of F. A. Otis & Company,
vs.
HENRY B. CULLAM, RECEIVER OF THE FIRST National Bank of Topeka, Kansas.

Be it remembered, that on the 4th day of May, 1875, the said plaintiffs, by Ennis, Foster & Brown, their attorneys, filed in the clerk's office of said court their petition, precipe, and security for costs in said entitled cause; which said petition, precipe, and security for costs, with the endorsements thereon, are in the words & figures following, to wit:

Petition.

In the circuit court of the United States for the district of Kansas.

FRANK A. OTIS, WILLIAM P. O'CONNOR, PARTNERS, doing business under the firm-name of F. A. Otis & Company,
vs.
HENRY B. CULLAM, RECEIVER OF THE FIRST National Bank of Topeka, Kansas.
} Petition.

3 The plaintiffs, who are partners, doing business under the firm-name of F. A. Otis and Company, and who are citizens and residents of the State of New York, complain of Henry B. Cullam, who is the receiver of the First National Bank of Topeka, Kansas, a banking association organized under the national banking act, and duly appointed under the provisions of said act by the Comptroller of the Currency, and a citizen of the State of Kansas, and say:

That, on the 15th day of August, 1872, the city of Topeka, a city of the second class, organized under the laws of the State of Kansas, assuming and pretending to act under and by virtue of an act of the legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds, the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872, and an act entitled "An act to incorporate cities of the second class and to repeal former acts," approved February 28, 1872, and in full compliance with all the forms of said acts, did issue and deliver one hundred thousand dollars of its negotiable bonds to the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, a private manufacturing corporation, organized under the laws of the State of

4 Kansas, and having its place of business in said city of Topeka, said bonds being payable to said King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, or bearer, twenty years after the date thereof, with interest thereon at the rate of seven per cent. per annum, payable semi-annually, with interest-coupons attached therefor, a copy of which said bonds is filed herewith and made part hereof, marked "Exhibit A."

That of the said one hundred thousand dollars of bonds so issued eighteen thousand dollars thereof became the property of the said First National Bank of Topeka, Kansas, before the appointment of the defendant as receiver thereof. That said bank, being the owner and holder of said bonds, employed one T. B. Eldridge as its agent to negotiate a sale of and to sell said bonds.

That on the day of April, 1873, acting as the agent of said bank, the said Eldridge took said bonds to the city of New York, in the State of New York, and there presented said bonds to Arthur T. Fitch and the plaintiffs herein, who were then partners residing & doing a banking business in the city, county, and State of New York, under the firm-name and style of Fitch, Otis & Co., and offered to sell said bonds to said Fitch, Otis and Company, who were then residents and citizens of the said city, county, and State of New York, and unacquainted with and ignorant of the laws of the State of Kansas. That, to induce
5 said Fitch, Otis & Co. to purchase said bonds, the said Eldridge, as the agent of said bank as aforesaid, represented to the said Fitch, Otis & Co. that said bonds had been duly and legally issued, and that the same were valid, and were of great value, to wit, were worth seventy-five cents on the dollar; that the installments of interest due on said bonds on the 15th day of February, 1873, had been promptly paid, upon the maturity thereof, out of a tax assessed, levied, and collected for that purpose, and that sufficient taxes had been levied and collected, and the same was then in the treasury, to pay the interest on said bonds to become due on the 15th day of August, 1873; all of which was true. That both the principal and interest of the said bonds would be punctually paid at the maturity of the same. That, at the time of the making of said representations to said Fitch, Otis & Co., the said Eldridge believed said representations to be true, and the said Fitch, Otis & Co., believing said representations to be true, and that said bonds were good and valid securities, and were what they purported to be, and were available, did, on the 2nd day of May, 1873, at the said city, county, and State of New York, purchased of said First National Bank, through its agent, Eldridge, said eighteen thousand dollars in bonds, paying said bank therefor the sum of twelve thousand eight hundred and fifty-two dollars therefor; which sum of money the said First National Bank received and still retained the same. That
6 afterwards, on the 1st day of July, 1873, the said firm of Fitch, Otis & Co. was dissolved, by the withdrawal therefrom of the said Arthur T. Fitch, and the plaintiffs thereupon, by agreement, became the owners of all the property and choses in action of the late firm of Fitch, Otis & Co., including the bonds above described, and of all rights of action arrising under the transaction aforesaid. That afterwards, to wit, when the second interest-coupon on said bonds became due & payable, on the 15th day of August, 1873, the said city of Topeka repudiated said bonds, and refused to pay said interest-coupons then due, and refused to pay said coupons or any coupons on said bonds subsequently due. That, on the 27th day of March, 1874, the Citizens' Savings and Loan Association of Cleveland, Ohio, which was the owner of eighty of the bonds issued by said city of Topeka, brought suit in this court, on the coupons on said bonds then due, against said city of Topeka. That at the June term, 1874, said action came on for trial, and it was then decided by said court that said bonds were absolutely void, for want of power in said city of Topeka to issue said bonds, and the judgment of said court was afterwards affirmed by the Supreme Court of the United States, to wit, at its October term, 1874. That the

defendant, although often requested and demanded so to do, accompanied with an offer to return said bonds, has not paid to the
7 plaintiffs the said sum of twelve thousand eight hundred and fifty-two dollars, or any part thereof, nor did the First National Bank pay the plaintiffs or their predecessors said sum before the appointment of the defendant as receiver.

The plaintiffs therefore ask judgment against the defendant for said sum of $12,852, with interest, at the rate of seven per cent. per annum, from the 3rd day of May, 1873, and costs of suit.

ENNIS, FOSTER & BROWN,
Attys. for Plffs.

Precipe.

The clerk will issue a summons for the defendant, directed to the marshal of said district and returnable May 7th, 1875. The plaintiffs ask judgment for $12,852, with interest, at the rate of seven per cent. per annum, from May 3rd, 1873, & costs.

ENNIS, FOSTER & BROWN,
Attys. for Plffs.

(Endorsed:) 1293. Frank A. Otis & William P. O'Connor, partners, doing business under the firm-name of F. A. Otis & Co., vs. Henry B. Cullam, receiver of the First National Bank of Topeka, Kansas. Filed May 4, 1875. A. S. Thomas, clerk. Alfred Ennis, C. M. Foster, & W. S. Brown, attys. for plff.

Security for costs.

In the circuit court of the United States for the district of Kansas.

8 FRANK A. OTIS & WILLIAM P. O'CONNOR, partners, doing business under the firm-name of F. A. Otis & Co.,
vs.
HENRY B. CULLAM, RECEIVER OF THE FIRST National Bank of Topeka, Kans.

I enter myself security for costs in said case, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and, in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them, I hereby agree and stipulate that execution may issue against my property for any costs taxed against them.

Dated this 4th day of May, 1875.

ALFRED ENNIS.

(Endorsed:) No. 1293. F. A. Otis & Co. vs H. B. Cullum, recr. Sec. costs. Filed May 4th, 1875. A. S. Thomas, clerk. Approved. A. S. Thomas, clerk.

And on this day, to wit, May 4th, 1875, the clerk of said court issued a summons in said entitled cause; which summons, with the marshal's return thereon, is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
District of Kansas, ss:

The United States of America to the marshal of the district of Kansas, greeting:

You are hereby commanded to notify Henry B. Cullum, re-
9 ceiver of the First National Bank of Topeka, Kansas, that he has been sued by Frank A. Otis and William P. O'Connor, partners, doing business under the firm-name of F. A. Otis and Company, in the circuit court of the United States for the district of Kansas, and that unless he answers by the 27th day of May, A. D. 1875, the petition of the said Frank A. Otis and William P. O'Connor, partners, doing business under the firm-name of F. A. Otis & Company, against him, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 7th day of May, A. D. 1875.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 4th day of May, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

(Endorsed:) Suit brought for the recovery of money. Amount claimed, $12,852.00, with interest from the 3rd day of May, A. D. 1873, at the rate of 7 per cent. per annum, & costs. Ennis, Foster & Brown, attorneys for plaintiffs. No. 1293. Circuit court of the United States, district of Kansas. F. A. Otis & Company vs. Henry B. Cullam, receiver of the First National Bank of Topeka, Kansas. Summons. Issued May 4th, 1875. Returnable May 7, 1875. Ennis, Foster & Brown, attorneys for plaintiffs.

U. S. marshal's return.

DISTRICT OF KANSAS, *ss:*

10 Recd. this writ May 4th, 1875, and executed it on the same day, Shawnee Co., State & district of Kansas, by delivering to the within-named defendant, Henry B. Cullam, personally, a true & certified copy hereof, with all the endorsements thereon.

W. S. TOUGH,
U. S. Marshal.
By CHAS. H. MILLER,
Deputy.

For service of writ, $2.00.

(Endorsed:) Filed May 5, 1875. A. S. Thomas, clerk.

And on this day, to wit, May 27th, 1875, the said defendant filed in the clerk's office of said court his demurrer in said entitled cause; which demurrer, with the endorsements thereon, is in the words and figures following, to wit:

Demurrer.

In the circuit court of the United States for the district of Kansas.

F. A. OTIS & CO., PLAINTIFFS,
vs.
H. B. CULLUM, RECEIVER OF THE FIRST NATIONAL Bank of Topeka, Kansas, defendant. } Demurrer.

And now comes the said defendant and demurs to the petition of the

said plaintiffs on the following grounds, to wit: That the petition does not state facts sufficient to constitute a cause of action.

PECK & RYAN,
Attorneys for Defendant.

(Endorsed:) No. 1293. F. A. Otis & Co. vs. H. B. Cullam, recr., &c. Demurrer. Filed May 27th, 1875. A. Thomas, clerk. Peck & Ryan, deft.'s attys.

11 At a term of the circuit court of the United States of America, in and for the district of Kansas, begun and held at Leavenworth, in said district, on Monday, the 7th day of June, A. D. 1875, there were present Hon. Samuel F. Miller and Hon. C. G. Foster, judges, and the following proceedings, amongst others, were had, and appear of record, in the words and figures following, to wit:

Journal-entry.

THURSDAY, *June 17th*, 1875.

FRANK A. OTIS AND WILLIAM P. O'CONNOR, partners, under the firm-name of F. A. Otis & Co.,
vs.
HENRY B. CULLUM, RECEIVER OF THE FIRST National Bank of Topeka. } 1293.

And now come the plaintiffs, by Alfred Ennis and C. M. Foster, their attorneys, and the defendant by Peck & Ryan, his attorneys, and the demurrer of the defendant to the plaintiffs' petition having been argued by counsel and submitted to the court, is by the court sustained. It is therefore considered and adjudged by the court, the plaintiffs standing on their petition, that the defendant go hence without day, and have and recover his costs in this action expended of and from the plaintiffs, taxed at $; and hereof let execution issue.

12 And on this day, to wit, June 18th, 1875, the said plaintiffs filed in the clerk's office of said court their appeal-bond in said entitled cause; which said bond, with the endorsements thereon, is in the words and figures following, to wit:

Appeal-bond.

Supreme Court of the United States.

FRANK A. OTIS AND WILLIAM P. O'CONNOR, partners, doing business under the firm-name of F. A. Otis & Co.,
vs.
HENRY B. CULLUM, RECEIVER OF THE FIRST National Bank of Topeka, Kansas.

Know all men by these presents that we, Frank A. Otis and William P. O'Connor, partners, doing business under the firm-name of F. A. Otis & Co., and Alfred Ennis, are held and firmly bound unto Henry B. Cullum in the sum of two hundred dollars, to be paid to the said Cullum as receiver of the First National Bank of Topeka, Kansas, or his assigns,

to *the* payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our heirs and executors and administrators, firmly by these presents, dated this 18th day of June, 1875.

Whereas the above-named Frank A. Otis and William P. O'Connor *hath* presented a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by
13 the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of the obligation is such, that if the above-named F. A. Otis & Co. shall prosecute *his* said writ of error to effect and answer all costs if *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

F. A. OTIS & CO.,
By ALFRED ENNIS.
ALFRED ENNIS.

(Endorsed:) No. 1293. Frank A. Otis & William P. O'Connor, partners as F. A. Otis & Co., vs. Henry B. Cullum, receiver of the First National Bank of Topeka, Kansas. Bond. Filed June 18, 1875. A. S. Thomas, clerk. Alfred Ennis et al., attys. for plffs.

14 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy from the record of all the proceedings had in the case of F. A. Otis & Co. vs. Henry B. Cullum, receiver, &c., No. 1293, in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this tenth day of July, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

15 UNITED STATES OF AMERICA:

The President of the United States to the judges of the circuit court of the United States for the district of Kansas:

Because in the records and proceedings, and also in the rendition of a judgment of a plea which is in said circuit court before you between Frank A. Otis and William P. O'Conner, partners, doing business under the firm-name of F. A. Otis & Co., and Henry B. Cullum, receiver of the First National Bank of Topeka, Kansas, a manifest error hath happened, to the great damage of the said Frank A. Otis and William P. O'Conner, as by their complaint appears; we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under the seal of said court, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States,
16 together with this writ, so that you have the same at the city of Washington on the second Monday in October, 1875, in the Supreme Court of the United States to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the United States, the 18th day of June, 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsed:) No. 1293. Frank A. Otis and William P. O'Conner, partners as F. A. Otis & Co., vs. Henry B. Cullum, receiver of the First National Bank of Topeka, Kansas. Writ of error. Filed June 18, 1875. A. S. Thomas, clerk. E. Alfred Ennis, C. M. Foster, & W. S. Brown, attys., for plaintiffs.

17 UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

To Henry B. Cullum, receiver of the First National Bank of Topeka, Kansas, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, in the District of Columbia, on the second Monday of October, A. D. 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein Frank A. Otis and William P. O'Conner, partners, doing business under the firm-name of F. A. Otis & Co., are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness the honorable Morrison P. Waite, Chief-Justice of the Supreme Court of the United States, this eighteenth day of June,
18 in the year one thousand eight hundred and seventy-five.

SAM. F. MILLER, *Judge.*

Henry B. Cullum, receiver of the First National Bank of Topeka, Kansas, defendant in the within and foregoing-entitled action, hereby acknowledges service of the within and foregoing citation, and agrees to appear to the said action therein named, at the time and place therein named, this the 18th day of June, A. D. 1875.

HENRY B. CULLUM,
Receiver,

By PECK & RYAN,
His Attorneys.

(Indorsed:) No. 1293. Frank A. Otis and William P. O'Conner, partners, &c., vs. Henry B. Cullum, receiver, &c. Citation. Filed June 18, 1875. A. S. Thomas, clerk. E.

19 UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October term, in the year of our Lord one thousand eight hundred and seventy-five.

FRANK A. OTIS AND WILLIAM P. O'CONNOR, partners, doing business under the firm-name of F. A. Otis & Company, plaintiffs in error,
vs.
HENRY B. CULLAM, RECEIVER OF THE FIRST National Bank of Topeka, Kansas, defendant in error.

Afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, come the said Frank A. Otis and

William P. O'Connor, partners, under the firm-name of F. A. Otis & Company, by Alfred Ennis, their attorney, and say that in the record and proceedings aforesaid there is manifest error, in this, to wit, that the said circuit court of the United States for the district of Kansas erred in sustaining the demurrer of the defendant in error to the
20 petition of the said plaintiffs in error, and that said circuit court erred in rendering judgment in favor of the defendant in error and against the plaintiffs in error, when by the law of the land the judgment of said circuit court should have been for the plaintiffs in error and against the defendant in error. And the said plaintiffs in error pray that the judgment aforesaid may be reversed and annulled and altogether held for nought, and that they may be restored to all things which they lost by occasion of the said judgment.

ALFRED ENNIS,
Atty. for Plaintiffs in Error.

(Indorsed:) No. 1293. F. A. Otis & Co. vs. Henry B. Cullum, receiver, &c. Assignment of error. Filed Sept. 20, 1875. A. S. Thomas, clerk.

21 EXHIBIT A.

UNITED STATES OF AMERICA:

No. *City bond.* Twenty years.

One thousand dollars. State, ad astra per aspera.

City of Topeka, Shawnee County, State of Kansas.

Twenty years after date, the city of Topeka, Shawnee County, and State of Kansas, for value received, promises to pay to the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, or bearer, the sum of one thousand dollars, with interest from date, at seven per cent. per annum, payable semi-annually, on the 15th days of February and August of each year, upon the presentation and surrender, as they severally become due, of the proper coupon therefor hereto attached, both principal and interest, payable at the banking-house of Winslow, Lanier & Co., in the city of New York, and State of New York. This bond is issued to aid and encourage the King Wrought-Iron Bridge Manufactory and Iron-Works, of Topeka, Kansas, in establishing and operating bridge-shops in said city of Topeka, under and in pursuance of section seventy-six of an act of the legislature of the State of Kansas entitled "An act to incorporate cities of the second class, and to repeal former acts," approved February 29, 1872; also an act of the legislature of the State of Kansas entitled "An act to authorize counties, incorporated cities, and municipal townships to issue bonds for the purpose of building bridges, aiding in the construction of
22 railroads, water-power, or other works of internal improvement, and providing for the registration of such bonds the registration of other bonds, and the repealing of all laws in conflict therewith," approved March 2, 1872.

{ SEAL OF THE CITY OF TOPEKA. } In witness whereof the said city of Topeka has caused this bond to be signed by Orrin T. Welch, mayor, and attested by R. H. C. Searle, city clerk, this the 15th day of August, 1872.

ORRIN T. WELCH, *Mayor.*

R. H. C. SEARLE, *City Clerk.*

That attached to each of said bonds were forty interest-coupons,

which said coupons (except the number and date of payment) are in words and figures following, to wit:

"On or before the 15th day of , 18 , the city of Topeka, Shawnee County, and State of Kansas, promises to pay to the bearer thirty-five dollars, at the banking-house of Winslow, Lanier & Co., in the city of New York, and State of New York, for value received, the same being for semi-annual interest due on city bridge-shop bond No. .

"ORRIN T. WELCH, *Mayor.*

"Attest: R. H. C. SEARLE, *City Clerk.*"

STATE OF KANSAS, *ss:*

I, A. Thoman, auditor of the State of Kansas, do hereby certify that this bond has been regularly and legally issued; that the signatures thereto are genuine, and that the same has been duly registered in my office according to law.

SEAL OF THE AUDITOR OF THE STATE OF KANSAS. In witness whereof I hereunto set my hand and affix my seal of office, at the city of Topeka, this 28th day of August, 1872.

A. THOMAN, *Auditor.*

The original bond, of which the foregoing is a copy, having been used as Exhibit A to the plaintiff's petition on the trial of this action, it is hereby agreed that the foregoing copy may be at this time filed as Exhibit A to the plaintiff's petition and treated as a part thereof.

September 14th, 1875.

ALFRED ENNIS & C. M. FOSTER,
Attorneys for Plaintiff.

23 PECK & RYAN,
Attorneys for Defendants.

(Endorsed:) No. 1293. F. A. Otis & Co. vs. Henry B. Cullum, receiver, &c. Exhibit A to petition. Filed Sept. 14, 1875. A. S. Thomas, clerk.

24 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, A. S. Thomas, clerk of the circuit court of the United States of America, for the district of Kansas, do hereby certify the foregoing to be a true, full, and perfect copy of Exhibit A to petition, with the endorsement thereon, in the case of F. A. Otis & Co. vs. Henry B. Cullum, receiver, &c., No. 1293 in said court.

In testimony wfiereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 14th day of September, A. D. 1875.

[SEAL.] A. S. THOMAS, *Clerk.*

(Indorsed:) No. 1293. F. A. Otis & Co. vs. Henry B. Cullum, receiver, &c. Copy of Exhibit A.

(Indorsement on cover:) No. 730. Frank A. Otis and William P. O'Conner, partners, doing business under the firm-name of F. A. Otis and Company, plaintiffs in err., vs. Henry B. Cullum, receiver of the 1st National Bank of Topeka, Kansas. Kansas, C. C. U. S. Filed 16th October, 1875.

IN THE

Supreme Court of the United States.

TO THE OCTOBER TERM, 1875.

Frank A. Otis and William P. O'Conner, partners, doing business under the firm-name and style of F. A. Otis & Co., *Plaintiffs in Error.*

vs.

Henry B. Cullum, Receiver of the First National Bank, of Topeka, Kansas, *Defendant in Error.*

ARGUMENT OF

ALFRED ENNIS,

Attorney for Plaintiff in Error.

GEO. W. MARTIN, Printer and Binder, Topeka, Kansas.

IN THE SUPREME COURT OF THE UNITED STATES.

F. A. Otis & Co.,
vs.
Henry B. Cullum, Receiver, &c. } No. 730.

It is hereby stipulated and agreed by and between the parties to the foregoing entitled action, that the words "*all of which was true*," found in folio 5, on page 2, of the printed record in said action, refer *solely* and *exclusively* to the representations "that the instalments of interest due on said bonds on the 15th day of February, 1873, had been promptly paid upon the maturity thereof, out of a tax assessed, levied and collected for that purpose, and that sufficient taxes had been levied and collected, and the same were then in the treasury, to pay the interest on said bonds to become due on the 15th day of August, A. D. 1873."

Topeka, Kansas, December 16th, 1875.

Alfred Otis
Attorney for Plaintiffs in Error.

Peck & Glynn & Hawk & Peck
Attorneys for Defendant in Error.

"An act to authorize counties, incorporated cities and municipal "townships to issue bonds for the purpose of building bridges, aiding "in the construction of railroads, water power or other works of inter-"nal improvement, and providing for the registration of such bonds,

In the Supreme Court of the United States.

TO THE OCTOBER TERM, 1875.

Frank A. Otis and William P. O'Conner, partners, doing business under the firm-name and style of F. A. Otis & Co., *Plaintiffs in Error.*

vs.

Henry B. Cullum, Receiver of the First National Bank, of Topeka, Kansas, *Defendant in Error.*

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF KANSAS.

STATEMENT OF THE CASE.

This was an action commenced, by the plaintiffs in error against the defendant in error, in the Circuit Court of the United States in and for the District of Kansas, at the June Term thereof, A. D. 1875, for money had and received.

The allegations of the petition are in substance as follows, to wit: that the Legislature of the State of Kansas, at the regular session thereof, for the year A. D. 1872, enacted two laws, the first of which was an act, entitled:

"An act to authorize counties, incorporated cities and municipal "townships to issue bonds for the purpose of building bridges, aiding "in the construction of railroads, water power or other works of inter-"nal improvement, and providing for the registration of such bonds,

"the registration of other bonds, and the repealing of all laws in con-
"flict therewith."

That said act was published and took effect March 7th, A. D. 1872.* That said act among other things, provided in *detail* for the calling of elections and the voting and issuing of bonds by counties, incorporated cities and municipal townships.

That the second-named act was an act entitled:

"An act to incorporate cities of the second class, and to repeal former
"acts."

That said act was published and took effect March 13th, A. D. 1872.†

That the seventy-sixth section of the last-named act reads as follows, to-wit:

"SECTION 76. The council shall have power to encourage the establish-
"ment of manufactories and such other enterprises as may tend to develop
"and improve such city, either by direct appropriation from the general
"fund or by the issuance of the bonds of such city in such amounts as the
"council may determine: *Provided*, That no greater amount than one
"thousand dollars shall be granted for any one purpose, unless a majority
"of the votes cast at an election called for that purpose shall authorize the
"same. The bonds thus issued shall be made payable at any time within
"twenty years, and bear interest not exceeding ten per cent. per annum:
"*And provided further*, That where the city council has heretofore, by
"ordinance, agreed to appropriate any money, or to issue any bonds of
"the city for the purpose of aiding or encouraging any such enterprise,
"the same may be done without regard to section forty,‡ and as if said
"vote had been taken."

That afterwards, to-wit, on the 15th day of August, A. D. 1872, in pursuance of the said enactments and in strict compliance with the requirements thereof, the city of Topeka, Kansas, a city of the second class, organized and existing under and by virtue of the laws of the State of Kansas, made, issued and delivered one hundred of its

*CHAPTER 68, Laws of Kansas, 1872, page 110.

†CHAPTER 100, Laws of Kansas, 1872, page 215.

‡SECTION forty referred to provides that at no time shall all the bonded indebtedness of any city of the second class exceed twenty per cent. of the taxable property within such city.

negotiable bonds, all bearing date August 15th, A. D. 1872; which said bonds, except the number thereon, were in words and figures following, to wit:

"UNITED STATES OF AMERICA.

"No.....] City Bond. [Twenty years.

"One thousand dollars. } CITY OF TOPEKA, Shawnee County, STATE OF KANSAS. { State. Ad astra per aspera.

"Twenty years after date, the City of Topeka, Shawnee County, and "State of Kansas, for value received, promises to pay to the King Wrought-"Iron Bridge Manufactory and Iron Works of Topeka, Kansas, or bearer "the sum of one thousand dollars, with interest from date at seven per cent. "per annum, payable semi-annually, on the 15th days of February and "August of each year, upon the presentation and surrender, as they sever-"ally become due, of the proper coupon therefor hereto attached, both prin-"cipal and interest payable at the banking house of Winslow, Lanier & Co., "in the city of New York and State of New York.

"This bond is issued to aid and encourage the King Wrought-Iron Bridge "Manufactory and Iron Works of Topeka, Kansas, in establishing and "operating bridge shops in said city of Topeka, under and in pursuance "of section seventy-six of an act of the Legislature of the State of Kansas, "entitled 'An act to incorporate cities of the second class, and to repeal "former acts,' approved February 29th, 1872. Also an act of the Legis-"lature of the State of Kansas, entitled 'An act to authorize counties, "incorporated cities and municipal townships to issue bonds for the pur-"pose of building bridges, aiding in the construction of railroads, water-"power, or other works of internal improvement, and providing for the "registration of such bonds, the registration of other bonds, and the repeal-"ing of all laws in conflict therewith,' approved March 2d, 1872.

"In witness whereof, the said city of Topeka has caused this bond to be "signed by Orrin T. Welch, Mayor, and attested by R. H. C. Searle, City "Clerk, this the 15th day of August, 1872."

{ SEAL OF THE CITY OF TOPEKA. } "ORRIN T. WELCH, *Mayor*."
"R. H. C. SEARLE, *City Clerk*."

That attached to each of said bonds were forty interest coupons, each of which said interest coupons, except the number thereon and date of payment thereof, was in words and figures following, to wit:

"On or before the 15th day of ————, 18——, the City of Topeka, "Shawnee county, and State of Kansas, promises to pay to the bearer "THIRTY-FIVE DOLLARS, at the banking house of Winslow, Lanier & Co.,

"in the city of New York and State of New York, for value received, the "same being for semi-annual interest due on city bridge shop bond No.—.

"ORRIN T. WELCH, *Mayor.*

"Attest: R. H. C. SEARLE, *City Clerk.*"

That indorsed upon the *face* of each of said bonds was the following certificate of registration, to wit:

"STATE OF KANSAS, ss.

"I, A. Thoman, Auditor of the State of Kansas, do hereby certify that "this bond has been regularly and legally issued; that the signatures "thereto are genuine, and that the same has been duly registered in my "office according to law.

"In witness whereof, I hereunto set my hand and affix my seal of office, "at the city of Topeka, this 28th day of August, 1872.

{ SEAL OF THE AUDITOR OF THE STATE OF KANSAS. }

"A. THOMAN, *Auditor.*"

That after the making, issuing, delivering and registration of each of said bonds, eighteen thereof—being eighteen thousand dollars of the same—were purchased by and became the property of the First National Bank of Topeka, Kansas.

That afterwards, to wit, on the —— day of April, A. D. 1872, said bank, by its duly authorized agent, appointed for that purpose, took said eighteen of said bonds, so owned by it, to the city of New York, in the State of New York, and *there* offered to sell the same to the plaintiffs in error, who were bankers, and, among other things, engaged in the purchase and sale of bonds and other like securities.

That in order to induce the plaintiffs in error to purchase said bonds said bank, by its agent aforesaid, represented to them that the said bonds had been *regularly* and *legally* issued; that the same were what they purported to be, to wit: valid, subsisting securities, *and were available;* that the same *were valuable,* being then worth seventy cents on the dollar; that *both* the *principal* and *interest* of said bonds would be promptly paid at the maturity thereof; that the first interest coupon attached to each of said bonds had been

promptly paid at the maturity thereof by the said city of Topeka, out of a tax, duly assessed, levied and collected for that purpose; that a tax had been duly assessed, levied and collected by the said city of Topeka, and the money was then in the hands of the Treasurer with which to pay the second interest coupon attached to each of said bonds at the maturity thereof.

That at the time of making such representations the said bank and its said agent, believed the same to be true; that the representations, that the first interest coupon attached to each of said bonds had been promptly paid at the maturity thereof by the said city of Topeka out of a tax assessed, levied and collected for that purpose, and that a tax had been assessed, levied and collected by the said city of Topeka and the money was then in the hands of the Treasurer, with which, to pay the second interest coupon attached to each of said bonds at the maturity thereof, *were true.*

That the plaintiffs in error, believing said representations so made by said bank, and its said agent, and relying upon the same as being true, were thereby induced to and did, on the 2d day of May, A. D. 1873, purchase said eighteen bonds from said bank and pay said bank therefor, in money, twelve thousand eight hundred and fifty-two dollars.

That at the time of purchasing said bonds the plaintiffs in error were residents and citizens of the city, county, and State of New York, and *unacquainted with, and ignorant of,* the laws of the State of Kansas.

That afterwards, to-wit, on the 15th day of August, A. D. 1873, at the time of the maturity of the second interest coupon attached to each of said bonds, the said city of Topeka repudiated the said bonds and refused to pay the said second

interest coupon attached thereto. That thereupon and at divers times afterwards, and before the commencement of this action, the plaintiffs in error offered to return said eighteen bonds to said bank, and at the same time demanded of said bank that it return to them, plaintiffs in error, the said twelve thousand eight hundred and fifty-two dollars so paid for said bonds, which said bank refused to do, but continued to retain the possession of the same.

That afterwards, to-wit, on the —— day of December, A. D. 1873, the said bank suspended.

That afterwards, to-wit, on the —— day of January, A. D. 1874, the defendant in error, Henry B. Cullum, was duly appointed and qualified as the receiver of said bank, and is still acting as such.

That after the appointing and qualifying of the said defendant, the said Henry B. Cullum, as receiver of said bank, and before the commencement of this action, the plaintiffs in error offered to return said eighteen bonds to him as such receiver, and demanded of him as such receiver that he return to them the said twelve thousand eight hundred and fifty two dollars, which he refused to do.

That afterwards, to-wit, on the 27th day of March, A. D. 1874, the Citizens Savings and Loan Association of Cleveland, Ohio, which was the owner and holder of eighty of said one hundred bonds, so made, issued and delivered by the said City of Topeka, as aforesaid, brought suit in the Circuit Court of the United States for the District of Kansas, on the over-due interest coupons belonging to said bonds, against the said city of Topeka; that at the June Term of said court, A. D. 1874, it was adjudged by said court that the said bonds

to which the said interest coupons sued on belonged, were void, for the want of power in the Legislature of the State of Kansas to enact the laws authorizing the issuing of the same, which said judgment was afterwards, to-wit, at the October Term thereof, A. D. 1874, affirmed by the Supreme Court * of the United States, a court of last resort.

That the plaintiffs in error demanded judgment for said twelve thousand eight hundred and fifty-two dollars, with interest thereon at the rate of seven per cent. per annum, since the 3d day of May, A. D. 1873.†

The defendant in error filed a demurrer to the petition of the plaintiffs in error, and assigned as a cause of demurrer, that the petition did not state facts sufficient to constitute a cause of action.‡

That upon the hearing of said demurrer, the Circuit Court sustained the same.§

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign as error the ruling of the Circuit Court in sustaining the demurrer of the defendant in error to the petition of plaintiffs in error.‖

*See 20 Wallace, 655.
†See Record folios, 2 to 7, inclusive.
‡See Record folio, 10.
§See Record folio, 11.
‖See Record folios, 19, 20.

ARGUMENT.

It is claimed, by learned counsel representing the defendant in error, that the bonds in question bore evidence upon their face that they had been issued for a *private*, as distinguished from a *public*, purpose, and were therefore void; of which fact the plaintiffs in error were, at the time of the purchase, bound to take notice.

The proposition involves, perhaps, the consideration of two questions, viz.:

First: The effect upon contracts of *mutual ignorance or mistake of fact.*

Second: The effect upon contracts of *mutual ignorance or mistake of law.*

These questions will be considered in the order in which they have been stated.

IGNORANCE OR MISTAKE OF FACT.

The bonds in question are, by their terms, negotiable securities, in as broad and unrestricted sense as any circulating medium of the country.*

It is true, that these bonds recite upon their face, that they were issued to aid and encourage the establishment of a manufacturing enterprise, *under and in pursuance of the provisions of two acts of the Legislature of the State of Kansas, referred to.*† This recital does not, however, affect the negotiable character of the bonds in any particular.

It is also true, that there appeared upon the *face* of these bonds, the certificate of the Auditor of the State of Kansas,

* For copy of bond see *ante*, pages 3, 4.
† For title of the acts of the Legislature referred to, see *ante*, pages 1, 2.

under his hand and seal of office, certifying that such bonds had been *regularly and legally issued; that the signatures thereto were genuine, and that the same had been duly registered in his office according to law.**

It will be seen that these bonds were in due form, with nothing but the ordinary recitals, found in like negotiable securities, showing the purpose for which they were issued, with a reference to the laws authorizing the same; no irregularity or defect whatever, being patent. That to satisfy the commercial world that such bonds were what they purported to be, valid, subsisting securities; and to allay the *inquisitive disposition* of all who might *presume* to seek information respecting the validity of such bonds, was, *in pursuance of law*, appended the certificate of one of the *executive officers* of the State of Kansas, *who might well be presumed, from the position he held, to know the laws of the State*, and who would do no wrong, certifying that such bonds *were valid*. This certificate, so far as the law-making power could make it so, was *conclusive* of the facts certified.

If these bonds are invalid, it is *not* because of any recital or defect appearing upon the face thereof. They recite upon their face that they were issued *under and in pursuance of the laws of the State of Kansas*. By referring to these laws, it is found that such bonds were authorized to be issued. If invalid, then it is because of the invalidity of the laws. The invalidity of these laws did *not appear* upon the face of the bonds. Were the plaintiffs in error bound to take notice of the invalidity of these laws? The plaintiffs in error at the time of purchasing these bonds were residents and citizens of the State of New York, and *unacquainted with, and ignorant of, the laws of the State of Kansas.*

Ignorance of the laws of a foreign government *is ignor-*

*For copy of the certificate of the Auditor of State, see *ante*, page 4.

ance of a fact, and may be relieved against in the same manner as a mistake as to a matter of fact—and in this respect *the statute laws of other States of this Union are foreign laws.* See Edwards on Bills and Notes, page 348; Kerr on Fraud and Mistake, 402; *The Bank of Chillicothe vs. Dodge*, 8 Barb., 233; *Curtis et al. vs. Leavitt*, 15 N. Y., on page 193; 9 Pick., 112; 3 Shepley, 45.

Then the question *is* one of *fact* and *not* of *law.* Was there ignorance or mistake of fact respecting the validity of these bonds at the time they were purchased by the plaintiffs in error? What were the facts? The bank, of which the defendant in error is receiver, being the holder and owner of the bonds in question, carried them to the city of New York and there offered the same for sale to the plaintiffs in error; that to *induce* the plaintiffs in error to purchase said bonds, said bank *represented* that said bonds had been *regularly* and *legally* issued; that the same were what they *purported to be*, good, valid, subsisting securities, and *were valuable;* that the matured interest had been promptly paid when due, out of a tax duly assessed, levied and collected for that purpose; that a tax had been duly assessed, levied and collected, and the money was then in the hands of the Treasurer with which to pay the interest then next maturing on said bonds; that both the principal and interest of said bonds *would be paid* at the maturity thereof.

That at the time of making said representations the said bank believed the same to be true; that the representations, that the matured interest had been promptly paid when due out of a tax duly assessed, levied and collected for that purpose, and that a tax had been duly assessed, levied and collected, and the money was then in

the hands of the treasurer with which to pay the interest then next maturing, were true.

That the plaintiffs in error, believing said representations, and relying upon the same as being true, were thereby induced to, and did, purchase the said bonds and paid therefor the money now sought to be recovered back.

That after the purchase of the said bonds by the plaintiffs in error the payment of the interest next maturing thereon was refused, and in an action to recover the same, the said bonds were, by a court of last resort, declared void, for want of power in the Legislature of the State of Kansas to enact the *laws*, to authorize the issuing of the same.

If the plaintiffs in error had failed to comply, upon their part, with the terms of the contract of purchase, could the bank or the defendant in error have maintained an action for specific performance? Or if the plaintiffs in error had made and delivered their promissory note to the bank in payment for the bonds, and suit should have been instituted thereon, by the bank, or the defendant in error, could not the plaintiffs in error have set up as a valid defense the fact that there was no consideration for such note? The solution of the foregoing propositions is an answer to the question, of whether or not the plaintiffs in error can maintain this action.

The courts will *not* compel specific performance of a contract, which was entered into through a mistake of material facts respecting the subject-matter, and which would never have been entered into had its true effect been understood. See Fry on specific performance of contracts, § 474; Kerr on Fraud and Mistake, page 411.

The courts will, however, grant relief to a party to recover back money paid without any consideration.

BLACKSTONE, in his Commentaries, vol. 3, 162, says:

"A third species of *implied assumpsits* is where one has had and received money belonging to another, without any valuable consideration given on the receiver's part: for the *law construes this* to be money had and received for the use of the owner only; and *implies* that the person so receiving promised and undertook to account for it to the true proprietor."

Ignorantia facti excusat is a maxim as old as the common law itself.

The courts will likewise grant relief in the equitable action for money had and received, where money has been paid under *ignorance or mistake* of material facts respecting the subject-matter of the transaction, and which would not have been paid had the facts been understood; and, more especially will such relief be granted, where the thing sold was *not what it was represented and purported to be,* and where the subject-matter of the sale had *no existence,* of which facts there was *mutual ignorance and mistake,* as in the case at bar. In the case at bar, there was a warranty, *implied by law,* that the bonds sold *were what they were represented and purported to be,* viz.: valid, subsisting securities, not mere waste paper, and that the city of Topeka was liable upon them. The defect, if there was one, was of such a nature and character that *no diligence or skill* could have detected it. Thus, having no means of protection, the plaintiffs in error are *presumed* to have *relied* upon the *representations* and *responsibility* of the bank, that the bonds were what they were offered for; hence the rule of *caveat emptor* does *not* apply.

KERR, in his work on Fraud and Mistake, page 396, says:

"Mistake is a ground for relief in equity. Mistake may be said to be some unintentional act, omission, or error arising from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. There is mistake if a man *through ignorance* be induced to do a thing which he would not have done, had he not been in error." See also Story's Equity Jurisprudence, vol. 1, § 110.

STORY, in his Commentaries on Equity Jurisprudence, vol. 1, says:

"§ 138*i*. But where the mistake is of so fundamental a character, that the minds of the parties have never, in fact, met; or where an unconscionable advantage has been gained, by mere mistake or misapprehension; and there was no gross negligence on the part of the plaintiff, either in falling into the error, or in not sooner claiming redress; and no intervening rights have accrued; and the parties may still be placed *in statu quo; equity will interfere*, in its discretion, in order to prevent intolerable injustice. This we believe to be the clearly-defined and well-established rule upon the subject, in courts of equity, both in England and America.

"§ 142. In cases of *mutual* mistake going to the *essence* of the contract, it is not necessary that there should be any presumption of fraud. On the contrary, equity will often relieve, however *innocent* the parties may be. Thus, if one person should sell a messuage to another, which was, at the time, swept away by a flood, or destroyed by an earthquake, without any knowledge of the fact by either party, a court of equity would relieve the purchaser, upon the ground that both parties intended the purchase and sale of a *subsisting thing*, and *implied* its existence as the basis

of their contract. It constituted, therefore, the *very essence and condition* of the obligation of their contract."

In the case of *Hurd vs. Hall*, 12 Wis., 112, which was an action to recover back money paid, under a *mutual* mistake, upon the purchase of certificates of sale of certain school and university lands, which certificates of sale, it subsequently transpired, were void.

DIXON, Chief Justice, in delivering the opinion of the court, says (see pages 124, 135, 136):

"That both the parties to this suit acted under a radical *mistake*, either in matters of *law* or in matters of *fact*, in the transaction disclosed by the record, can hardly admit of denial or doubt. That such was the case with the plaintiff seems less questionable. It is impossible to suppose that he would have purchased the certificates in question at the price agreed upon, if he had known that they were worth less than so many pieces of blank paper. . . .

"There are other grounds upon which I am of opinion that the plaintiff is entitled to maintain this action. In every sale of a chattel there is *an implied warranty* that it *exists*, and that the vendor has title to it. So in the assignment of an instrument not negotiable, for a full and fair price, I think the assignor *impliedly warrants that it is valid*, and that the *obligor is liable upon it*, unless it clearly appear that the parties intended to the contrary. This doctrine has long been settled on common-law principles, in many of the States of this Union, by courts of the highest respectability and learning, and I perceive no reason to doubt its soundness or justice.

"I also think that the action could be maintained on the ground of a *failure of consideration*, by reason of the plaintiff's not having obtained what he bargained for; that the

instruments did not answer the description of those which the defendant professed to sell, or the plaintiff to buy. The instruments assigned, though *resembling school-land certificates, were not such certificates at all.* They were mere worthless pieces of paper, drawn up in the form of such certificates. The fact that they were signed by the commissioners in their official capacity, can make no difference, so long as they were wholly unauthorized to do so."

See also *Howell vs. Wilson,* 2 Blackf., 418; *Maupin vs. Compton,* 3 Bibb, 215; *Mandeville vs. Reddle,* 1 Cranch, 290; *Lee vs. Hopkins,* 12 Smedes & Marsh., 299; *Furniss vs. Ferguson,* 15 N. Y., 437; *Mackie vs. Davis,* 2 Wash., 219; *Norton vs. Rose,* 2 Wash., 233; *Goodall vs. Stuart,* 2 Hen. & Mun., 105; *Caton vs. Lenox,* 6 Rand., 31; *Coiner vs. Housbarger,* 4 Leigh, 452.

In the case of *Lawton vs. Howe,* 14 Wis., 241, which was an action for money had and received, the money sought to be recovered back having been paid upon the purchase of certificates of sale, of certain school and university lands, which certificates, it subsequently transpired, were *void;* therefore presenting a similar state of facts to that of the case of *Hurd vs. Hall, supra.*

DIXON, Chief Justice, in delivering the opinion of the court, says (see pages 246, 250, 251):

"This is an action at law, in the nature of an action for money had and received, to recover back the price paid. It is a kind of equitable action. 'This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which, *ex aequo et bono,* he ought to refund.'* . . .

"The source of liability is, perhaps, more correctly de-

*SEE 3 Blackstone's Com., 163.

scribed as an *implied warranty* that the *instruments sold* are of the *kind* and *description* which they *purport on their face to be.* . . . The defect is of such a nature that it is useless to scrutinize and examine the instrument. No *skill or watchfulness* at the time of sale will enable the purchaser to detect it. Being without the means of self-protection, it may well be said that he relies upon the responsibility of the seller that the instrument is what he offers it for, and that the rule of *caveat emptor* does *not* apply."

In the case of *Ledwick vs. McKine et al.*, 53 N. Y., 307, which was an action brought to recover back money paid upon the purchase of what purported to be the bonds of the Vicksburg, Shreveport and Texas Railroad Company by the plaintiff's assignor, the defendants at the time of making the sale to the plaintiff's assignor, represented *that the bonds were the bonds of the railroad company, issued by and binding upon it, which representations the plaintiff's assignor relied upon, notwithstanding that such bonds* BORE EVIDENCE UPON THEIR FACE *that they were imperfect and incomplete, which fact was apparent to both the plaintiff's assignor and defendants.*

It subsequently transpired that the bonds had never been issued by the railroad company, and that the railroad company was not liable upon them, that the railroad company's office and safe had been broken open and the bonds carried away in their imperfect and incomplete condition.

FOLGER, Justice, in delivering the opinion of the court, says (see page 312):

"The plaintiff puts his right of action upon the ground, that the defendants sold to his assignor these instruments,

being personal property, without having any title thereto, and that hence they are liable upon their implied warranty of title. It is not to be disputed that, if these papers are other than negotiable instruments, there was in the sale of them by the defendants an implied warranty of their title to them, and that on a failure of title they are liable. The defendants insist, however, that they only impliedly warrant the genuineness of the execution of the instrument. In this they err. (Murray vs. Judah, 6 Cow., 484.) *The seller warrants the genuineness of the instrument,* AND THAT IT IS WHAT IT PURPORTS TO BE."

In the case of *Thrall vs. Newell,* 19 Vermont, 202, which was an action upon an alleged warranty, that a promissory note, transferred by the defendant to the plaintiff for a valuable consideration, and purporting to be signed by A. and B., was a good and valid note, and that the signers *had the capacity to contract:* it having subsequently transpired that the note was invalid as to one of the signers by reason of his *insanity* at the time he signed the same; an action upon the note having been successfully defended by him upon that ground.

HALL, Judge, in delivering the opinion of the court, says (see page 208):

"I am therefore strongly inclined to think, that the defendant should be held liable upon a warranty of the note, *implied by law* from the sale of it."

See also *Lobdell vs. Baker,* 3 Metc., 469; *Bank of St. Albans vs. Farmers' and Mechanics' Bank,* 10 Vermont, 145; *Hastings vs. Lovering,* 2 Pick., 214; *Coolidge vs. Brigham,* 1 Metc., 547.

In the case of *Terry vs. Bissell et al.*, 26 Conn., 23, which was an action for money had and received,

The defendants sold the plaintiff a note, not then due, purporting to be signed by A., and indorsed by B. and C. The signature of A. was genuine, but the endorsement of B. and C. a forgery. Both parties were, at the time, ignorant of the forgery.

ELLSWORTH, Judge, in delivering the opinion of the court, says (see pages 30, 31, 32, 33, 39 and 40):

"The question made in this case is, whether the sale of this note to the plaintiff is a sale of a specific instrument, just as it is, true or false, or a note of hand truly endorsed, as it purports to be, by George W. Gorton and C. G. Smith. If it be the former, the plaintiff cannot recover; if the latter, then, in the opinion of a majority of the court, he can.

"No question is made as to the entire integrity of the defendants, who intended to sell, and supposed they did sell, to the plaintiff a note well and truly endorsed, as this purports to be. It is equally true that the plaintiff intended to buy, and supposed he did buy, just such a note, and neither of the parties thought of anything else. Certain it is, then, that both parties were *mistaken* in a fact of vital importance, so that in truth the plaintiff has parted with his money without the equivalent which both parties expected he would receive. The essential value of the note lying in the validity of the endorsements, when the endorsements failed, the note was no better than a blank piece of paper. Though the maker was bound, yet he was insolvent, and had absconded to parts unknown. It is an endorsed note in form only, a bit of paper with ink on it, quite unlike the thing supposed to be sold by one party and purchased by the other.

"There are several views of the case, all of which will lead to the same conclusion. In the first place, there was *no sale*, because the subject-matter of the sale *had no existence*. . . . We think the purchaser was entitled to have a thing of the kind and description which the thing sold purported and was understood to be. We say nothing of quality, for as to that the maxim *caveat emptor* applies, but only of kind and description, to which the maxim is *not* supposed to apply. . . . Now in this case, the parties assumed, as the very basis of their negotiation, the genuineness of the endorsements. They understood each other as bargaining for a true and genuine note, and not a feigned and spurious one, or one which might possibly turn out to be such. No risk was thought of as entering into the consideration to be paid, or into the value and character of the paper. . . .

"We believe the law to be, in the sale of notes and other instruments, if not of chattels generally, that the thing shall correspond in *kind* and *description* with what it *purports to be*, and is sold as being at the time of sale. . . .

"When the defendants brought out and presented to the plaintiff the note in question, to be sold and transferred to him, they must be *presumed to have said*, if not in words, yet in the transaction itself, that the note they were offering to sell *was what it purported to be*, and nothing less or different.

"There is yet another view of this case which is decisive against the defendants. When the defendants brought out this note and offered it to the plaintiff for sale as being their own property, they must be understood as presenting it as a *genuine note, like what it purported to be.* If this be so, then we think this is a *representation* which, according

to the books, constitutes a *warranty* that the note is a *real note* and really indorsed as it appears to be."

In the case of *The Kingston Bank vs. Eltinge*, 40 N. Y., 391, which was an action for money paid under a *mutual* mistake of facts, where either party might have easily learned the facts and where the plaintiff had within his reach the *means* of ascertaining the truth; and that he omitted to use vigilance and care by which the mistake would have been avoided.

HUNT, Chief Judge, in delivering the opinion of the court, in which both the English and American authorities, bearing upon the subject, are brought under review, says (see pages 395, 396):

"So far as can be gathered from the statement of the Judge trying the cause, and the opinion of the court below, their judgment in favor of the defendants, was based first upon the idea that, by the exercise of proper diligence, the plaintiffs might have learned that the defendants' executions had expired, and thus have avoided the error; and second, that by the discharge of their judgments, the defendants had lost their lien upon the real estate of their judgment debtor, and if compelled to refund, would in fact, lose their debt. I will consider each of these positions.

"As to the first proposition, that the plaintiff had the *means* of learning the true state of the case. It cannot be denied that either party might have made inquiry, and would probably have learned the actual facts. There is no reason to suppose that the sheriff would have refused an explanation of the order and lien of the executions in his hands, if he had been called upon for that purpose. This course, however, was open to either party, and there is no more negligence in failing to obtain the

knowledge, by one party, than by the other. The defendants were equally bound with the plaintiffs to possess the knowledge, and if the want of it is a ground for complaint, are *equally censurable* with the plaintiffs for not possessing it.

"Care and diligence are not controlling elements in the case. It is a question of fact, merely. The inquiry is, are the parties *mutually* in error, and did they act upon such *mutual mistake*, not whether they ought so to have acted. If, in consequence of such mutual mistake, one party has received the property of the other, he must refund, and this without reference to vigilance or negligence. On a sale and purchase of real estate, the rule and the principle are different. It is a case of a bargain in which the law requires the exercise of care and attention."

In the case of *The National Bank of Commerce vs. The National Mechanics' Banking Association*, 55 N. Y., 211, which was an action for money had and received, the money sought to be recovered was paid upon a forged or altered check, under a mistake of facts.

RAPALLO, Judge, in delivering the opinion of the court, says (see page 213):

"It is now settled, both in England and in this State, that money paid under a mistake of fact may be recovered back, *however negligent* the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund."

In the case of *Canal Bank vs. Bank of Albany*, 1 Hill, 287, which was an action for money had and received, the money sought to be recovered was paid under a

mutual mistake of facts, as follows: The defendants, endorsers of a draft payable to B.'s order, received the same through several successive endorsements, B.'s name appearing as the first, and as agents of their immediate endorser, but without disclosing their agency, presented it to the plaintiffs, by whom it was paid. It was subsequently ascertained that the name of B. was a forgery.

COWEN, Justice, in delivering the opinion of the court, says (see page 289):

"In point of title, then, the case of the defendants was the same as if the name of Bently had not appeared on the bill. They have obtained money of the plaintiffs without right, and on the exhibition of a forged title as a genuine one. The plaintiffs paid their money under the mistaken belief thus induced that the name was genuine.

"But it is said, the equities of the parties are equal, and the defendants having the possession, must prevail. No doubt the parties were equally innocent in a moral point of view. The conduct of both was *bona fide*, and the negligence or rather misfortune of both the same. It was the *duty*, or, more properly, as a measure of prudence, in each to have inquired into the forgery, which both omitted. But this raises no preference at law or equity in favor of the defendants, *but against them.* They have obtained the plaintiffs' money without consideration; not as a gift, but under a mistake. *For the very reason that the parties were equally innocent, the plaintiffs have the right to recover.*"

In the case of *Duncan et al. vs. Berlin et al.*, 46 N. Y., 685, which was an action for money paid under a mistake of fact,

RAPALLO, Judge, in delivering the opinion of the court, in which all the Judges concurred, held: That where money

is paid under a *mistake* of fact, *negligence* in making the mistake does not prevent the party from recovering it back, if the other party has not been prejudiced.

EARL, Chief Commissioner, enunciates the *same doctrine* in the case of *Lawrence et al. vs. American National Bank*, 54 N. Y., 432.

In the case of *Kelly vs. Solari*, 9 Mason & Welsby's R., 54, which was an action, in the Court of Exchequer, for money had and received:

Angelo Solari, the late husband of the defendant, Madame Solari, in the year 1836, effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th day of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November, following, the actuary of the Company informed two of the directors, Messrs. Bates and Clift, that the policy had lapsed by reason of the non-payment of the premiums, and Mr. Clift thereupon wrote on the policy, in pencil, the word "Lapsed." On the 13th of February, 1841, the defendant applied at the office of the company for the payment of the sum of £1,000, secured upon the policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a check for 987*l.* 10*s.*, which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the company it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, *entirely forgotten* that the policy in question had lapsed.

It was claimed that if the directors had *had knowledge*, or the *means of knowledge*, of the policy having lapsed, the

company could not recover, and that their afterwards *forgetting it* would make no difference.

LORD ABINGER, C. B., in delivering the opinion of the court, says (see pages 57 and 58):

"I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their [the directors] having had *means of knowledge*. That is a very vague expression, and it is difficult to say with precision what it amounts to: for example, it may be that the party may have the means of knowledge on a particular subject only by sending to and obtaining information from a correspondent abroad. . . . I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts, which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the facts, otherwise I do not believe they would have brought the action."

PARK, B., in delivering an opinion in the same case, says (see pages 58 and 59):

"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it. . . . The position that a person so paying is precluded from recovering by laches, in not availing himself of the *means of knowledge* in his power, seems, from the cases cited, to have been founded

on the dictum of Mr. Justice *Bayley,* in the case of *Milnes vs. Duncan;* and with all respect to that authority, I do not think it can be sustained in point of law. . . . If it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact."

In the case of *The Union National Bank of Troy vs. The Sixth National Bank of New York,* 43 N. Y., 452, which was an action for money paid under a *mutual* mistake of facts,

FOLGER, Judge, in delivering the opinion of the court, says (see pages 454, 455):

"The rule established by the class of cases of which *The Kingston Bank vs. Eltinge* (40 N. Y., 391) is one, is not questioned by the counsel for appellants. But he insists that there is a distinction between them and the case in hand. Admitting that there was a *mutual mistake* in supposing that the note was paid, when it was not paid, he claims that the respondents were negligent in not making inquiry and using the *means* at their hand for arriving at correct information of the facts. But as a sufficient answer to this, it is held that it is *no bar* to an action, that the party paying *had the means* of knowing, and might have availed himself of those means by care and attention, and thus have arrived at exact knowledge. (*Waite vs. Leggett,* 7 Cowen, 195.)

"Care and diligence *are not* controlling elements in the case. It is a question of fact merely. The inquiry is, are the parties *mutually* in error, and did they act upon such *mutual* mistake? Was there not an error between the parties? And the determination of the fact controls the result.

"If the money is paid under the impression of the truth of a fact which is untrue, *it may*, generally speaking, *be recovered back, however careless* the party may have been in omitting to use due diligence to inquire into the fact. (*Kelley vs. Solari*, 9 M. & W., 54; *Marriott vs. Hampton*, 2 Smith Leading Cases, 403, notes.) If it were conceded that the plaintiffs *were* subject to the imputation of negligence, *that alone would not bar their action.*"

In the case of *Cabot Bank vs. Morton, et al., Adm'rs*, 4 Gray, 156, which was an action to recover the amount of two promissory notes, discounted by the plaintiffs, for the intestate, which promissory notes turned out to be forgeries.

SHAW, Chief Justice, in delivering the opinion of the court, says (see page 157):

"The question here is, whether the plaintiffs in their declaration have set forth any legal cause of action—the action proceeds on the ground of contract—of an implied stipulation, growing out of the nature of the transaction; that the signatures of the names of the parties borne on the notes were, as they purported to be, their *real and genuine* signatures, so that the notes were entitled to all the credit due to them in case such signatures *were real and genuine*. . . .

"The case does not proceed on the ground of fraud; it does not suggest that the intestate had any knowledge of the forgery, or any purpose willfully to utter and pass a forged security. . . .

"Looking at the case in this point of view, it seems to fall under a general rule of law that in every sale of personal property the vendor *impliedly warrants* that the article is in fact *what it is described and purports to be*, and that the vendor has a good title or right to transfer it."

See also *Young vs. Adams*, 6 Mass., 182; *Markle vs. Hatfield*, 2 Johns., 455; *Herrick vs. Whitney*, 15 Johns., 240; *Canal Bank vs. Bank of Albany*, 1 Hill, 287; *Talbot vs. Bank of Rochester*, 1 Hill, 295.

In the case of *Young vs. Cole*, 3 Bingham, N. C., 724, which was an action for money had and received, the plaintiff, a stock broker, was employed by the defendant in *April*, 1836, to sell for him four *Guatemala* bonds, of 254*l.* each.

The plaintiff, in three or four days, sold the bonds to *Briant* for 300*l.*, and, deducting 1*l.* 5*s.* for his commission, paid the defendant 298*l.* 15*s.*

Briant, who was conversant with the usages of the stock exchange, kept the bonds two days, and then sold them again.

The bonds *were not stamped.*

In 1829, the *Guatemala* government *had issued an order*, which was advertised in the *London* newspapers, requiring the holders of such bonds to produce them, and have them stamped by an agent of that government *within a certain time;* in default of which such bonds would *not be recognized* by the government.

Evidence of the advertisement was offered and rejected; but it was proved that since that time unstamped *Guatemala* bonds were not a marketable commodity on the stock exchange.

Upon that ground *Briant's* vendee soon returned the bonds.

Briant representing the matter to the plaintiff, the plaintiff, without communicating with the defendant, or returning the bonds, refunded what *Briant* had paid him, and now

sought to recover the amount which he had himself paid over to the defendant.

Both parties, at the time of the transaction, were ignorant that a stamp was necessary.

On behalf of defendant, it was objected at the trial before TINDAL, Chief Justice, that under these circumstances, the plaintiff could not recover on the declaration for money paid or money had and received; but should have declared specially on the implied warranty by the defendant that the bonds he offered for sale were marketable bonds.

It was further urged that, as *Briant* had kept the bonds for a length of time sufficient to enable him to decide whether he would make them his own or not, and had actually sold them to a third person, the plaintiff had no right to call on the defendant for a payment which the plaintiff was not compelled to make; at all events, not unless he had apprised the defendant of what he was about to do, and had returned the bonds so as to have afforded the defendant the opportunity of replacing them with stamped instruments.

It was further insisted, that *Briant* having had an opportunity to inspect the bonds, there was no implied warranty on the part of the plaintiff.

The case of *Street vs. Blay*, 2 B. & Adol., 456, was referred to, where it was held, that a person who had purchased a horse warranted sound, sold it again, and repurchased it, could not, on discovering that the horse was unsound when first sold, require the original vendor to take it back again; nor could he, by reason of the unsoundness, resist an action by such vendor for the price.

TINDAL, Chief Justice, in delivering the opinion of the court, says (see page 730):

"It appears to me that the sum for which the verdict has been given, is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to *Briant*, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were *real Guatemala* bonds; such as were *salable* on the stock exchange. It seems, therefore, that the *consideration* on which the plaintiff paid his money, has failed as completely as if the defendant had contracted to sell foreign gold coin, and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value."

BOSANQUET, Justice, in the same case, in delivering an opinion, says (see page 731):

"I agree in the principle of the cases which have been cited as to breach of warranty, but this is not a case of that description. Here, no consideration has been given for the money received by the defendant: the bonds he delivered to the plaintiff were not *Guatemala* bonds, but, on the stock exchange, worthless paper . . . According to the principle established by *Child vs. Morley*, the defendant was bound to reimburse the plaintiff what he was thus compelled to pay."

In the case of *Cripp vs. Reade*, 6 T. R. (D. & E.), 606, which was an action for money had and received,

LORD KENYON, Chief Justice, in delivering the opinion of the court, says (see pages 606 and 607):

"I do not wish to disturb the rule of *caveat emptor* in *Bee vs. Holbech*, and in other cases where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title; but here the whole passed by parol, and it proceeded as a *misapprehension* by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a *mistake*, I think that an action for money had and received will lie to recover it back; in the case cited no action at all could have been maintained."

In the case of *Jones et al. v. Ryde, et al.*, 5 Taunton, 488, which was an action for money had and received, the subject of the action was this: the defendants, who were bill-brokers, were possessed of a navy bill, which purported to have been issued by the Transport Board, etc.

The defendants discounted the bill with the plaintiffs. Subsequently the bill was presented at the Navy Pay Office for payment, which was refused on account of certain alterations in the bill.

GIBBS, Chief Justice, in delivering the opinion of the Court, says (see page 492):

"This question was much mooted in *Funn vs. Harrison*, 3 T. R., 757, and it is true to a certain extent, viz.: that in the case of a bill, note, or other instrument of the like nature, which passes by endorsement, if he who negotiates it does not indorse it, he does not subject himself to that

responsibility which the indorsement would bring on him, viz., to an action to be brought against him as endorser; but his declining to endorse the bill does not rid him of that responsibility which attaches on him for putting off an instrument as of a certain description, which turns out not to be such as he represents it. The defendant has in the present case put off this instrument as a navy bill of a certain description; it turns out not to be a navy bill of that amount, and therefore the money must be recovered back."

DALLAS, Judge, in an opinion delivered in the same case, says (see page 495):

"This is a case in which the parties are equally innocent, and have equal knowledge, and equal means of knowledge. I have no doubt whatsoever of the plaintiff's right to recover. The case falls not only within the general principle, that where a man has paid more than the thing is eventually worth, and the consideration fails, he may recover it back, but also comes within the express authority of *Cripps vs. Reade*. Upon the ground therefore, that the money was in part paid by mistake, upon a consideration that had failed, I am of opinion that the plaintiffs are entitled to recover it back."

In the case of *Fuller et al. vs. Smith et al*, Ryan & Moody's R., 49, which was an action for money had and received, the plaintiffs, who were bankers, had discounted for the defendants, who were bill brokers, a bill of exchange for 271*l*., and which the defendants did not endorse.

It afterwards turned out that the bill was, as regarded the drawer and acceptor, altogether a forgery.

ABBOTT, Lord Chief Justice, in delivering the opinion of the court, says (see page 50):

"I think, however, that the plaintiffs are, at all events,

entitled to your verdict, being of opinion, in point of law, that even if the money was paid over, as has been stated, the defendants are nevertheless liable to the plaintiffs. If you take a bill without an endorsement, you cannot sue the person from whom you receive it, but then you take *it as a bill;* but here, in fact, the instrument on the faith of which the money was advanced, turns out not to be a bill of exchange, as it was *represented,* being altogether a forgery, and that I conceive to be the distinction."

In the case of *Farrer vs. Nightingal,* 2 Espenasse's, 639, which was an action for money had and received,

Lord Kenyon, Chief Justice, in delivering the opinion of the court, says (see page 639):

"I have often ruled, that where a person sells an interest, and it appears that the interest, which he pretended to sell, was not a true one; as for example, if it was for a lesser number of years than he had contracted to sell, the buyer may consider the contract as at an end, and bring an action for money had and received, to recover back any sum of money he may have paid in part performance of the agreement for the sale. And though it is said here, that upon the mistake being discovered in the number of years, of which the defendant stated himself to be possessed, he offered to make an allowance *pro tanto,* that makes no difference in the case. It is sufficient for the plaintiff to say, 'That is not the interest which I agreed to purchase.' The plaintiff's action is well brought."

In the case of *Gardiner vs. Gray,* 4 Campbell's R., 144, which was an action for money had and received, the plaintiff purchased from the defendant twelve bags of *waste silk,* which, upon delivery, was found to be of a quality not salable under the denomination of "waste silk."

LORD ELLENBOROUGH, in delivering the opinion of the court, says (see page 145):

"I am of opinion, however, that under such circumstances, the purchaser has a right to expect a *salable article* answering the description in the contract. Without any particular warranty, this is an *implied term* in every contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot without a warranty insist that it shall be of any particular quality of fineness, but the intention of both parties must be taken to be, that it shall be *salable* in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill. The question then is, whether the commodity purchased by the plaintiff be of such a quality as can be reasonably brought into the market and sold as *waste silk*. The witnesses describe it as unfit for the purpose of waste silk, and of such a quality that it cannot be sold under that denomination."

See also *Tye vs. Fynmore*, 4 Camp., 462; *Bridge vs. Wain*, 1 Stark R., 504; *Shepherd vs. Kain*, 5 B. & Ald., 240; *Westropp et al. vs. Solomon*, 8 Common Bench R., 345; *Comperty vs. Bartlett*, 2 Ellis & Blackburn, 846; *Rice vs. Neal*, 3 Burr., 1354.

In the case of *Rutherford vs. McIvor*, 21 Alabama, 750, which was an action for money had and received, the money sought to be recovered having been paid under a mistake of facts,

DARGAN, Chief Justice, in delivering the opinion of the court, says (see page 757):

"In the case of *Lucas vs. Worswick*, 1 Moo. & Rob., 293; and in the case of *Waite vs. Leggett*, 8 Cowen, 195,

the Supreme Court of New York held, that to deprive a party of the right to recover back money paid, on the ground of his knowledge that it was not due, it should appear that the money *was paid* with a knowledge that it was not due; and the fact that the party had the *means* of knowing that the money was not due, was no answer to the action, provided there was a mistake of fact in the payment.

"These decisions, in my judgment, announce the correct rule; and although decisions may be found which indicate a different rule, and that the *means* of ascertaining the real facts are tantamount to a knowledge of them, yet I cannot yield to them, and I can but think that they are in conflict with the law; for, on examining the cases in which a recovery has been allowed on the ground of a mistake, I will undertake to say that in a large majority of them, the party paying *had the means* within his reach to ascertain the true facts of the case."

In the case of *Ketchum vs. Bank of Commerce*, 19 N. Y., 499, which was an action for money paid under a *mutual* mistake of material facts,

DENIO, Justice, in delivering the opinion of the court, says (see page 502):

"If the plaintiffs had, as they have alleged in the complaint, purchased of the defendant the notes which the latter held against R. G. L. Schuyler, both parties to the contract understanding at the time that, although the makers were insolvent, the notes were secured by the hypothecation of three hundred and seventy shares of New York and New Haven Railroad stock, of which hypothecation the plaintiffs were to have the benefit, then, as as it turned out that there really was no stock

hypothecated, the defendant having been imposed on by fraudulent certificates, I think the plaintiffs, upon offering to redeliver the certificates in season, would be entitled to call for the money they have paid the defendant, *as money paid under mutual mistake of material facts.* Where there is a *common mistake* in respect to the existence of a thing undertaken to be sold, and it does not in fact *exist,* the contract for the sale is *void,* and any money which the purchaser has paid on account of it, *may be recovered back in the equitable action for money had and received.*"

See also *Martin vs. McCormick,* 4 Seld., 331.

In the case of *Boyer vs. Pack,* 2 Denio, 107, which was an action for money had and received, the money sought to be recovered having been paid under a mistake of facts,

JEWETT, Justice, in delivering the opinion of the court, says (see page 108):

"It is a familiar principle which seems not to be denied here, that money paid by one to another, under a *mistake* as to the *facts,* may be recovered back in an action for money had and received.'

Notwithstanding that the adjudications of the courts, of both this country and England, for the period of more than fifty years past, would entitle the plaintiffs in error to recover upon the proposition already considered, the second proposition will, nevertheless, be noticed.

IGNORANCE OR MISTAKE OF LAW.

Vinnius, Huber, D'Aguesseau, and others of their time, maintained that money paid under *ignorance or mistake of law* could be recovered back.*

*SEE Pothier on Obligations, by Evans, vol. 2, page 313, No. 18.

In the French Civil Code *no distinction* is made between ignorance or mistake of law and ignorance or mistake of fact.*

The English adjudications declare the rule to be, *that the courts have the power to relieve against mistakes of law,* as well as against mistakes of fact.†

Ignorantia juris non excusat, is a common-law maxim, not universally applicable in equity. That while all rational beings are presumed to know the law, the rule is subject to the exception that where the question of law involved is *doubtful,* there may, *in reality,* be ignorance or mistake of law: hence, an act done through such ignorance or mistake of law may be relieved against.

STORY, in his work on equity jurisprudence, vol. 1, (10 ed.) says:

§ 138*f*. "We trust the principle, that cases may and do occur, where courts of equity feel compelled to grant relief, upon the mere ground of *misapprehension of a clear rule of law,* which has so long maintained its standing among the fundamental rules of equity jurisprudence, is yet destined to afford the *basis* of many *wise and just decrees,* without infringing the general rule that mistake of law is presumptively no sufficient ground for equitable relief.

§ 138*g*. "The English courts evidently *regard with favor* this branch of equity jurisprudence. There is certainly not the same enthusiasm manifested by the courts in Westminster Hall, to stigmatize the idea of asking relief in a court of equity from the consequences of a mistake of law, as a gross and puerile absurdity, which we sometimes meet upon this side of the Atlantic. The *very latest* decisions of the

*SEE Code Napoleon, 1376, 1377.

†SEE *Stone vs. Godfrey,* 5 De G., M. & G., 76; *Campbell vs. Ingilby,* 3 De Gef. & Jones, 393; *Broughton vs. Hutt,* 3 De Gef. & Jones, 501; *Croft vs. Middleton,* 2 Kay & Johnson, 194.

English courts treat it *as a recognized and highly beneficial* branch of remedial justice."

BROOM, in his work on Legal Maxims, in referring to the rule that all persons are presumed to know the law, says (see page 232):

"With respect to the presumption of legal knowledge here spoken of, . . . the law nevertheless takes notice that there may be a *doubtful* point of law, and that a person may be ignorant of the law, and it is quite evident that *ignorance of the law does in reality exist.*"

KERR, in his work on Fraud and Mistake, pages 398, 399, says:

"If a man through *misapprehension or mistake of the law* parts with, or gives up, a private right of property, or assumes obligations upon grounds upon which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot in conscience retain the benefit or advantage so acquired.

"Mistake in law, to be a ground for relief in equity, must be of a material nature, *and the determinal ground of the transaction.*

"Mistake of law may be a misapprehension of the law, or of their private rights to property by both parties to a transaction, both of them making substantially the same mistake; or it may be a misapprehension of the law, or of his private rights by one of the parties alone."

The doctrine that a court of equity *will relieve* against *ignorance or mistake of law* was promulgated by the Su-

preme Court of the United States as early as the year 1823.

In the case of *Hunt vs. Rousmanier's Admr.*, 8 Wheaton, 174, which was an action asking relief in consequence of an act done by the parties in *mutual ignorance of the law;* and in referring to the case of *Lansdown vs. Lansdown*, (reported in Mosely, 364,) where relief *had been* granted against a *mistake of law*, MARSHALL, Chief Justice, in delivering the opinion of the court, says (see page 215):

"There are certainly strong objections to this decision in *other* respects; but *as a case* in which relief has been granted on a *mistake in law*, it cannot be entirely disregarded.

"Although we do not find the naked principle, that relief may be granted on account of *ignorance of law*, asserted in the books, *we find no case in which it has been decided that a plain and acknowledged mistake in law is beyond the reach of equity.*"

In the case of *Hunt vs. Rousmanier's Admr.*, 1 Peter, 1, which was an action for relief in consequence of an act done by the parties in *mutual ignorance of the law*, being before the court a second time, and being the same case last above referred to,

WASHINGTON, Justice, in delivering the opinion of the court, says (see page 17):

"It is not the intention of the court, in the case now under consideration, to lay it down that there *may not be* cases in which a court of equity will relieve against a *plain mistake* arising from *ignorance of law.*"

In the case of *Chaplin vs. Laytin*, 6 Paige Ch. R., 189,

which was an action for relief in consequence of an act done by the parties in *mutual ignorance of the law*,

McCoun, V. C., in delivering an opinion, says (see pages 195, 197):

"So if both parties should be ignorant of a matter of law, and should enter into a contract for a particular object, and the result according to law should be different from what they mutually intended, there, on account of the surprise or immediate result of the mistake of both, there can be no good reason why the court should not interfere to prevent the enforcement of the contract and to relieve from the unexpected consequences of it. . . . A contract entered into under a mutual misconception of legal rights, amounting to a *mistake of law* in both contracting parties by which the object and end of their contract, according to its intent and meaning, cannot be accomplished, *is as liable to be set aside or rescinded* as a contract founded in mistake of matters of fact; and that the court has the same power to grant relief in the first case as in the last."

In the case of *Warder vs. Tucker*, 7 Mass., page 452, which was an action upon an obligation made under ignorance or mistake of law, the court says:

"And although the defendant, when he first received notice from the plaintiffs of the protest of the bill, considered himself as liable by law to pay the plaintiffs the amount of it, *yet his ignorance of the law shall not bind him to fulfill an engagement made through mistake of law.*"

See also *Freeman et al. vs. Boynton*, 7 Mass., 488; *Chaplin vs. Laytin*, 10 Wend., 407; *Freeman vs. Curtis*, 51 Me., 140; *Reservoir Co. vs. Chase*, 14 Conn., 123.

The case might be stated thus: that at the time the

plaintiffs in error purchased the bonds, they were residents and citizens of the State of New York, and *unacquainted with and ignorant of the laws of the State of Kansas*, and consequently *ignorant* of the legal principle involved in the question of the validity or invalidity of the bonds; while, on the other hand, the bank and its agent *were* residents and citizens of the State of Kansas, and are *presumed* to have known the laws thereof, and, also, to have been cognizant of the legal principle involved in the question of the validity or invalidity of the bonds, and in *fact* to have *known* that the bonds *were void;* hence the *representations* made by the bank and its agent, that such bonds had been *regularly and legally* issued, that they were *valid, subsisting securities*, and were *valuable*, in order to induce the plaintiffs in error to purchase the same, were, at the time of making the same, *known* to the bank and its agent *to be false.*

BISPHAM, in his Principles of Equity, page 192, says:

"Thus, where *ignorance of the law* exists on one side, and that ignorance is known and taken advantage of by the other party, the former will be relieved. More particularly will this be so if the *mistake* was *encouraged* or *induced* by the *misrepresentations of the other party.*"

Was the legal principle involved in the question of the validity of these bonds of a doubtful character, and one about which ignorance may be supposed to have existed? The answer is certainly *not* a difficult one.

At the time these bonds were purchased by the plaintiffs in error, the statutes of the State of Kansas,* then in force, providing for the organization of corporations, declared

*SEE chapter 23 of the General Statutes of Kansas of 1868, page 190.

that corporations were of but *two* kinds: *First*, PUBLIC; *Second*, PRIVATE. That a *public* corporation was one that had for its object the government of a portion of the State. That *private* corporations were of *three* kinds: *First*, Corporations for religion; *Second*, Corporations for charity or benevolence; and, *Third*, Corporations for *profit*. That under the *third* class, of *private* corporations, are *set out* and *specifically* designated *Railroad* and *Manufacturing* corporations; both are, by the law creating them, declared to be *private* corporations. *Public* or *municipal bonds* had been voted and issued to aid and encourage the building of railroads, and the validity of such bonds had been sustained by the court of last resort in the State.*

That without any adjudication to the contrary, was it not reasonable for the plaintiffs in error to *presume* that public or municipal bonds issued to aid and encourage the establishment of manufactories, were of the same nature, character and validity, of like bonds issued to aid and encourage the building of railroads? With all the circumstances, taken together with the representations of the bank respecting the validity of the bonds, the certificate, or rather, *adjudication*, of the Auditor of State, attached to the bonds, certifying that such bonds had been *regularly* and *legally* issued, etc., was not the legal principle involved of a doubtful character, and one about which the plaintiffs in error might well be supposed to have been ignorant? But this is not all.

At the time these bonds were purchased by the plaintiffs in error, and for a long time prior thereto, the Constitution of the State of Kansas, by *express terms, vested*

*SEE *Board of Commissioners, &c., vs Miller*, 7 Kansas, 479.

*all the legislative power of the State in a legislature.** That such legislature, in pursuance of the authority thus vested in it, duly enacted a law *specifically* authorizing the issuing of public or municipal bonds to *aid and encourage the establishment of manufactories,*† which enactment, it is *conceded, did not* infringe, nor was it repugnant to *any* provision of the Constitution of the State, the Constitution of the United States, or the laws and treaties thereof. *No* such constitutional provision *has ever been pointed out, nor can it be done. No such provision existed.*

That the doctrine enunciated by the Supreme Court of the United States, as early as the year 1798,† and reaffirmed and approved on numerous occasions since that time,‡ that the legislative power of the States, without constitutional restrictions and limitations, was, like that of the British Parliament, *supreme* and *omnipotent;* and, (in the language of Justice IREDELL), "that whatever the legislative power chose to enact would be *lawfully enacted,* and the judicial power would *never interfere* to pronounce it void. . . . The court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice," had never been questioned by any respectable authority, but on the contrary, had been *unqualifiedly* ratified and confirmed by the courts of last resort, of almost every State

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*SEE section 2 of the Bill of Rights, and section 1 of article 2 of the Constitution of the State of Kansas, General Statutes of 1868, pages 39, 43.

†SEE section 76 of chapter 100 of the laws of Kansas of 1872, page 215.

‡SEE *Calder vs. Bull,* 3 Dallas, 398; *Cooper vs. Telfair,* 4 Dallas, 18.

§SEE *Fletcher vs. Peck,* 6 Cranch, 87; *League vs. Young,* 11 Howard, 185; *McCulloch vs. State of Maryland,* 4 Wheaton, 316; *Owings vs. Speed, et al.,* 5 Wheaton, 420; *Legal-tender Cases,* 12 Wallace, 531; *Railway Co. vs. County of Otoe,* 16 Wallace, 667; *The Township of Pine Grove vs. Edward B. Talcott,* 19 Wallace, 666.

in the Union.* Was not, then, the legal principle involved, at least apparently, conclusively settled in favor of the validity of the laws authorizing the issuing of these bonds? and consequently the validity of the bonds; and the fact that the highest judicial tribunal of the nation would, at some future day, strike down what was then, and had been for a period of seventy-five years, the fundamental law of the land, a question of such a doubtful character, and a result so unexpected, that it could not have been known to the plaintiffs in error, and about which they were most confessedly ignorant? But still this is not all.

The legal principle thus involved was so problematical, in its character, that when presented to this honorable court for a decision,† a divided court was found to exist. A part of the court, two, if not three members thereof, being *of the opinion* that the bonds *were valid*, and so fixed were their *convictions of right*, upon the subject, that a dissenting opinion was filed.

*SEE *State of Kansas vs. Robinson et al.*, 1 Kas., 17; *Beauchamp vs. The State*, 6 Blackf., 299; *The Lafayette & C. R. R. Co. vs. Giger*, 34 Ind., 185; *The People vs. Draper*, 15 N. Y., 532; *S. & V. R. R. Co. vs. City of Stockton*, 41 Cal., 147; *Clarke vs. City of Rochester*, 24 Barb., 446; *Luke vs. The City of Brooklyn*, 43 Barb., 54; *The People vs. The N. Y. Gas Light Co.*, 64 Barb., 55; *Wynhammer vs. The People*, 13 N. Y., 378; *The Bank of Chenango vs. Brown*, 26 N. Y., 467; *Morrison vs. Springer*, 15 Iowa, 304; *Stewart vs. The Board of Supervisors, &c.*, 30 Iowa, 9; *Bushnell vs. Beloit*, 10 Wis., 195; *Twitchell vs. Blodgett*, 13 Mich., 127; *Sears vs. Cottrell*, 5 Mich., 251; *Brown vs. Buzan*, 24 Ind., 194; *The Commonwealth vs. McCloskey*, 2 Rawle, 369; *Butler's Appeal*, 73 Penn. St., 448; *Board Com. Leavenworth vs. Miller*, 7 Kas., 479; *Commonwealth vs. Smith*, 4 Birney, Penn., 123; *Freeland vs. Hastings*, 10 Allen, 585; *Oliver vs. Washington Mills*, 11 Allen, 279; *Cheney vs. Hooser*, 9 Ben. Monroe, 345; *Maddox vs. Graham*, 2 Metc., 56; *Tyler vs. The People*, 8 Mich., 333; *The People vs. Mahoney*, 13 Mich., 501; *Oliver vs. Keightley, Auditor of Putnam County et al.*, 24 Ind., page 514; *Talbot vs. Hudson*, 16 Gray, 417; *Wellington, Petitioner*, 16 Pick., 95; *Ogden vs. Saunders*, 12 Wheaton, 270; *Dow vs. Norris*, 4 N. H., 16; *Franklin vs. Wood*, 15 Geo., 80; *Foster vs. Essex Bank*, 16 Mass., 245; *Newland vs. Marsh*, 19 Ill., 381; *Hartford Bridge Co. vs. Union Ferry Co.*, 29 Conn., 227; *Eason vs. State*, 6 Eng., 481; *Matter of Clinton Street*, 2 Brews., Penn., 599; *Leonard vs. Wiseman*, 31 Md., 201; *Bennett vs. Bogg*, Baldwin, 74, 75; *Kirby vs. Shaw*, 7 Harris, Penn., 258; *State vs. Dawson*, 3 Hill, 100; *James vs. Patton*, 2 Selden, 9; *Clarke vs. People*, 26 Wend., 599; *The Sun Mutual Insurance Co. vs. City of New York*, 5 Sandford, 10; *Land et al. vs. Dorman, et ux.*, 3 Scam., 238; *State vs. Springfield Township*, 6 Ind., 84; *People vs. Supervisors of Orange*, 17 N. Y., 241.

See, also, *Golden vs. Prince*, 3 Wash. C. C., 313; COOLEY'S Constitutional Limitations, pages 167, 168, 182, 183.

†SEE 20 Wallace, page 655.

Then when this honorable court, with the bonds before it, *with all the recitals upon the face thereof*, as when purchased by the plaintiffs in error, cannot agree as to the validity or invalidity of the same, how, in the name of reason, is it to be said that the plaintiffs in error are *presumed* to have *known* that such bonds *were void?* Can it not, then, be truthfully said that the legal principle involved *was* and *is* of a confessedly doubtful character, and about which the plaintiffs in error may rightly be supposed to have been *ignorant*, and, perhaps, to be ignorant still?

During the hearing of the argument on the demurrer, in the Circuit Court, it was asserted that, while the bonds in question were not void by reason of any law of the State of Kansas, nor by reason of the Constitution of the State of Kansas or the Constitution of the United States, nevertheless they *were void* by reason of a *universal law*, an *indefinite, intangible* and *invisible something*, of which all mankind were bound to take notice.

It cannot be presumed that this court will subscribe to such an untenable proposition; hence, argument to refute the same is thought unnecessary.

The case, then, is this: The bank, or the defendant in error, has the money of the plaintiffs in error without having given any consideration or equivalent therefor, hence ought to refund the same.

Wherefore, the plaintiffs in error pray that the ruling of the Circuit Court in sustaining the demurrer to the petition and rendering judgment in favor of the defendant in error, be reversed.

ALFRED ENNIS,
Attorney for Plaintiff in Error.

IN THE

Supreme Court of the United States.

Frank A. Otis and William P. O'Conner, partners, doing business under the firm name and title of F. A. Otis & Co., *Plaintiffs in Error.*

vs.

Henry B. Cullum, Receiver of the First National Bank of Topeka, Kansas. *Defendant in Error.*

BRIEF OF

PECK & RYAN,

Attorneys for Defendant in Error.

THE COMMONWEALTH JOB PRINT, TOPEKA KANSAS.

IN THE

Supreme Court of the United States.

Frank A. Otis and William P. O'Conner, partners, doing business under the firm name and title of F. A. Otis & Co., *Plaintiffs in Error.*

vs.

Henry B. Cullum, Receiver of the First National Bank of Topeka, Kansas. *Defendant in Error.*

The record presents this simple question:

Whether a purchaser in the markets of the world, of municipal securities void upon their face, has a right of action to recover back the consideration he paid for them; in the absence of fraud, express warranty, guaranty or endorsement.

The story of the transaction is a short one. The defendant's agent went to New York where the plaintiff was engaged in the business of buying and selling stocks, and public securities and offered to sell the latter the bonds in question. Upon inspection the plaintiff made an offer for them, which was accepted; the broker received the bonds, and the agent the stipulated price.

True the pleader sets forth with much particularity the conversation had between the parties at the time of the transaction, but since he imputes to us no fraud, nor yet charges an express warranty, it is difficult to conjecture for what purpose he does so, unless it be to swell the commercial dignity of this Wall street transaction.

The plaintiff's brief is largely devoted to a discussion of the effect of "mutual mistake of fact." As there is no mistake of fact in this case we do not regard that portion of the argument as founded upon a rock. The residue of plaintiff's brief discusses "mutual ignorance of law", a subject deserving the most thoughtful consideration of counsel in this case, but unfortunately for the argument it is at war with settled principle.

MISTAKE OF FACT.

If we understand the plaintiff's theory of this branch of his argument, it is, that the bonds in question were void under and by the laws of Kansas, and that the vendee, residing in New York, is not presumed to have known those laws, but on the contrary to him these were matters of fact.

The answer to this is, that this class of bonds was void, not simply by the laws of Kansas, but by and under a universal fundamental law pervading all government, State and National, and that by reason thereof neither Kansas nor any other State could give them validity. This universal law, the vendee is conclusively presumed to have known.

The power nowhere existed to tax the property of the citizen for the purpose for which the bonds were issued. The imposition of such a tax was without constitutional authority; a legislative usurpation of power not granted by the fundamental law.

Commercial National Bank of Cleveland *vs.* City of Iola 2d Dillon, C. C. 353.

An express provision of a State constitution seeking to confer authority upon the legislature to tax the property of the citizen to pay this class of bonds would be in derogation of an essential principle of the general government, and therefore void. For, in the language of this Court, "the theory of our government, State and National, is opposed to the deposit of unlimited power anywhere." If it is competent for the States of this Union to incorporate such a provision in their constitutions, they thereby do deposit unlimited power to tax for all purposes. Granted the existence of such power, and that "theory of our Government" ceases to have any virtue.

The inevitable tendency of such power would be subversive of one of the chief ends of government. If it is competent for the constitution of a State to authorize taxation for one class of private enterprise, it is competent for it to confer the power to tax for all private purposes. The exercise of such a power is simply plunder, calculated to inflame the worst passions of men, and to loosen the very foundations of public order. In the name of law one sect might compel the property of another to build its churches, colleges, seminaries, etc. In the guise of taxation the Protestant majority might invest itself with the property of the Catholic minority. The property holding few might be forced to surrender its possessions to the non-property holding many. Instead of having a government furnishing protection to private

property, we should have one subjecting the property of the weak to the caprice and enjoyment of the strong ; a government authorizing that which civilized nations to-day denounce as an "invasion of private rights." Respecting this great principle the integrity of the government is conspicuously maintained by this Court in the case of the Loan Association *vs.* Topeka, 20 Wall, 655 662 in an opinion remarkable for the vigor of its logic. The Court says (in a discussion of this identical issue of bonds). "We have referred to this history of the contest "over aid to railroads by taxation, to show that the "strongest advocates for the validity of these laws never "placed it on the ground of the unlimited power in the "State legislature to tax the people, but conceded that "where the purpose for which the tax was to be issued "could no longer be justly claimed to have this public "character, but was purely in aid of private or personal "objects, the law authorizing it was beyond the legisla- "tive power, and was an unauthorized invasion of private "right.

"It must be conceded that there are such rights "in every free government beyond the control of the "State. A government which recognized no such rights "which held the lives, the liberty, and the property of "its citizens subject at all times to the absolute disposi- "tion and unlimited control of even the most democratic "depository of power, is after all but a despotism. It is "true it is a depotism of the many, of the majority, if "you choose to call it so, but it is none the less a despot- "ism. It may well be doubted if a man is to hold all "that he is accustomed to call his own, all in which he "has placed his happiness, and the security of which is "essential to that happiness, under the unlimited domin- "ion of others, whether it is not wiser that this power "should be exercised by one man than by many.

"The theory of our governments, State and National, "is opposed to the deposit of unlimited power anywhere. "The executive, the legislative, and the judicial branches "of these governments are all of limited and defined "powers.

"There are limitations on such power which grow "out of the essential nature of all free governments. "Implied reservations of individual rights without which "the social compact could not exist, and which are "respected by all governments entitled to the name. No "court, for instance would hesitate to declare void a "statute which enacted that A and B who were husband "and wife to each other should be so no longer, but that "A should thereafter be the husband of C, and B the "wife of D. Or which should enact that the homestead "now owned by A should no longer be his, but should "henceforth be the property of B.

"Of all the powers conferred upon government that "of taxation is most liable to abuse. Given a purpose "or object for which taxation may be lawfully used and "the extent of its exercise is in its very nature unlimited. "It is true that express limitation on the amount of tax "to be levied or the things to be taxed may be imposed "by constitution or statute, but in most instances for "which taxes are levied, as the support of government, "the prosecution of war, the National defense, any limi- "tation is unsafe. The entire resources of the people "should in some instances be at the disposal of the "government.

"The power to tax is, therefore, the strongest, the "most pervading of all the powers of government, "reaching directly or indirectly to all classes of the "people. It was said by Chief Justice Marshall, in the "case of McCulloch *vs.* The State of Maryland, that the "power to tax is the power to destroy. A striking

"instance of the truth of the proposition is seen in the "fact that the existing tax of ten per cent. imposed by "the United States on the circulation of all other banks "than the National banks, drove out of existence every "State bank of circulation within a year or two after its "passage. This power can as readily be employed "against one class of individuals and in favor of another "so as to ruin the one class and give unlimited wealth "and prosperity to the other, if their is no implied "limitation of the uses for which the power may be "exercised.

"To lay with one hand the power of the government "on the property of the citizen, and with the other to "bestow it upon favored individuals to aid private en- "terprises and build up private fortunes, is none the "less a robbery because it is done under the forms of law "and is called taxation. This is not legislation. It is a "decree under legislative forms.

"Nor is it taxation. A 'tax,' says Webster's Dic- "tionary, 'is a rate or sum of money assessed on the "person or property of a citizen by government for the "use of the Nation or State. Taxes are burdens or "charges imposed by the legislature upon persons or "property to raise money for public purposes.'"

Thus the plaintiff's pretensions to "mistake of fact" are utterly foundationless, for it is not alone the laws of Kansas but of the general government as well that vitiate his purchase.

MISTAKE OF LAW.

"If it was a mistake of law, there being no aver-
"ment or proof that any fraud or imposition was
"practiced upon him, he must abide the consequences of
"his ignorance, and cannot on that account be permitted
"to avoid his contracts. * * * A mistake
"of law happens when a party having full knowledge of
"the facts comes to an erroneous conclusion as to their
"legal effect."

Hurd *vs.* Hall, 12 Wis. 112.

"A mistake or ignorance of the law forms no ground
"of relief from contracts fairly entered into, with full
"knowledge of the facts, under circumstances raising no
"presumption of fraud, imposition or undue advantage.
"Testing the case by the principle 'that a mistake or
"ignorance of the law forms no ground of relief from
"contracts fairly entered into with a full knowledge of
"the facts,' and under circumstances repelling all pre-
"sumptions of fraud, imposition or undue advantage
"having been taken of the party, none of which are
"chargeable upon the appellants in this case, the ques-
"tion then is, were the complainants entitled to relief.
"To which we respond decidedly in the negative."

Bank of the United States *vs.*
Daniels, 12 Peters 48, 56.

"A representation of what the law will or will not
"permit to be done, is one on which the party to whom
"it is made has no right to rely, and if he does so it is
"his folly, and he cannot ask the law to release him from
"the consequences."

Fish *vs* Cleveland, 33 Ill, 243.

"That a misrepresentation or misunderstanding of
"the law will not vitiate a contract where there is no
"misunderstanding of the facts, is well settled."

Upton, Assignee, *vs* Tribilcock,
Supreme Court of the U. S.
No. 482. October term 1875.

"The rule that a mistake of law does not avail, "prevails in equity as well as at common law. * * "A statement that the Insurance Company had consulted "with good lawyers, and that their opinion was as stated, "should have been clear proof to the defendant that a "representation of the law was a matter of opinion only." Ibid.

We need not multiply authorities upon a principle as old as our jurisprudence and which this court pronounces "well settled."

If the plaintiff can recover at all, his right to do so must depend on some legal obligation on the part of the defendant to return to him the consideration paid for the bonds. It is admitted that there is no express obligation; also that there was no fraud in the transaction.

Was there then an IMPLIED WARRANTY, for if not there is an end of the case.

If we examine the authorities cited by plaintiff we will find in every case the existence of latent facts which the vendor, under the circumstances, impliedly warranted against.

In the case of Hurd *vs.* Hull, 12 Wis. 112 there was nothing on the face of the certificates to indicate they were void. They were of no validity because there was a superior outstanding title to the land called for by the certificates when issued; the certificates did not recite upon their face the existence of that superior title. It is expressly decided in this case that if it had been "a mistake of law, there being no averment or proof that any fraud or imposition was practiced upon him, he must abide the consequences of his ignorance." Although the plaintiff refers to this case with apparent relish, the application of the law affirmed by it seems to us to be fatal to his claim here.

The case of Ledwich *vs.* McKim *et al.* 53 N. Y., 307 is where non-negotiable paper was stolen from a Railway Company, which afterwards came to the hands of a bona fide holder who assigned it to another. He was held upon an implied warranty of title. The fatal fact was not recited upon the face of the paper.

In Thrall *vs.* Newhall 19 Vermont 202 the promissory note did not recite upon its face that one of the makers was insane when he signed it.

In Terry *vs.* Bissell *et al.* 26 Conn. 23 an inspection did not disclose the forgery.

The Kingston Bank *vs.* Eltinge 40 N. Y. 391 is a case where money was paid under the belief that the officer had actually levied an execution upon certain property, whereas no levy had been made and the execution had run out in the hands of the officer.

The case of the National Bank of Commerce *vs.* The National Mechanics' Banking Association 55 N. Y. 211, is another case of money paid upon a forged instrument, and the court intimates that if the forgery "could have been detected by a bare inspection of the instrument itself" the plaintiff could not recover back the money paid on it.

The Guatemala bond case cited by the plaintiff is where the bonds had been repudiated by the government. The bonds we infer were valid when issued, without a stamp. Afterwards the government gave notice by publication in a newspaper that these bonds must, by a stated time, be returned by the holder to an agent of the government to be stamped, otherwise the government would not recognize them. There was nothing on the face of these bonds to indicate that they had been called in by publication of that notice, nor was it apparent upon the face of the paper that a stamp was required. These bonds were repudiated because they were

not returned and stamped in accordance with the published notice. The publication of that notice was a fact unknown to the parties at the time.

The plaintiff produces no authority which does not present a case where there existed a fact or facts dehors the instrument which invalidated it. The law will not permit a purchaser, having the property before him, to shut his eyes and ears and omit to use his senses and pretend that he relied on the representations made by the vendor, and was thereby misled.

Vandwalker *vs.* Osmer, 65 Barb 556 561.
Bryant *vs.* Pember 45 Vt. 487, 491.

In Lambert *vs.* Heath, 15 M. & W., 487 it appeared that the defendant, a stock broker, had bought for the plaintiff, scrip certificates of shares in the Kentish Coast Railway Company. These were signed by the Secretary and issued from the offices of the Company, and were the subject of sale and purchase in the market for several months, when the scheme was abandoned, and the Company repudiated the scrip as not genuine, on the allegation that it was issued without authority. The plaintiff then sought to recover back the price from the stock broker, on the ground that the latter had not delivered genuine scrip. But the Court held the buyer bound by his bargain, saying: "If this was the only Kentish Coast Railway scrip in the market, and one person chooses to sell and the other to buy that, then the latter has got all that he contracted to buy."

In the case at bar the plaintiff bought the bonds upon an inspection of them. They are not void for any reason not apparent on their face; all signatures are genuine; every proceeding is formal; they are not tainted with fraud; there is no defect of title. They are

in every respect what they purport to be. They are void because they were issued to aid a private enterprise. There could be no lawful authority anywhere under the dominion of the Federal Government, to issue them for such a purpose. The purpose for which they were issued was written upon their face. The only and the fatal imputation against them is that they were issued for an object for which no State could authorize taxation to pay them. Their invalidity was stamped upon them as conspicuously as in the case of confederate bonds. The plaintiff can recover here upon no principle that would not give him the same right had they instead been confederate bonds.

The defendant by submitting the bonds to plaintiff's inspection said to him "These bonds were issued to aid a private manufacturing corporation," for this was the language of the bonds themselves. The law was present telling him that such bonds could not be lawfully issued by any power in this country.

Then pray what did or could the defendant warrant by implication? What has he impliedly promised that fixes a liability upon him? Was there anything wrong with these bonds of which the plaintiff was not informed when he bought them? Was there a material fact pertaining to them not brought directly to his notice at the time of purchase?

That there can be an implied warranty that they were issued for a valid purpose, when the purpose for which they were issued was so written upon their face as to be apparent upon inspection, is absurd. The idea that a vendor may impliedly warrant the existence of conditions, which he informs his vendee at the time does not exist, has yet to be promulgated. When the defendant offered to sell the plaintiff these bonds, reciting upon their face that they were issued to aid a private

manufacturing corporation, we cannot conceive how he impliedly warranted that such recital was false, and that in truth they were issued for some imaginary public use authorized by law. Though the idea is preposterous, the right of the plaintiff to recover must rest upon this absurdity. It may have been the opinion of the vendee at the time of purchase that the bonds were valid: be that as it may, the facts were all fairly before him at the time; the fact that he came to an erroneous conclusion as to their legal effect, cannot be held to fix upon his vendor a legal liability until a new rule respecting such transactions shall be recognized by the Judicial tribunals of the country.

These public securities are commodities bought and sold in the markets of the world, and if one chooses to purchase them in the market and they are what they purport to be, the purchaser must in law be regarded as having got what he bargained for, though they prove to be utterly valuless. If they purport to be such as are denounced by the law of the land, he who deals in them does so advisedly, and the law will not relieve his folly.

PECK & RYAN and GEO. R. PECK,

Atty's for Defendant.